

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID BRISTOL,

Appellant.

No. 38154-1-II

UNPUBLISHED OPINION

Houghton, J. — David Bristol appeals his conviction for first degree incest, arguing trial court error in excluding a portion of his intended testimony and in closing the courtroom. We reverse and remand for a new trial.

FACTS¹

One night in August 2007, Bristol picked up his 17 year-old-adopted daughter, MB, from work and took her home. All other members of the household were out of town at the time.

According to MB, Bristol offered to give MB a massage when they got home. MB said that Bristol touched her vagina during the massage and she asked him to stop. She told Bristol that she “wouldn’t say anything” if he took her to her boyfriend’s house, which he did. II Report of Proceedings (RP) at 65. When MB arrived at her boyfriend’s home, she told her boyfriend, his mother, and his sister “[e]verything.” II RP at 67. That night, MB called her mother, Annicka

¹ We derive the facts from the evidence presented at trial.

Bristol, and “told her what happened.” II RP at 68. She did not call the police. After that night, MB moved into the home of her boyfriend, Garrett Gibbs.

On October 19, officers contacted MB because someone had told them about the incident.

² MB told the officers “everything.” II RP at 71. The officers arrested Bristol.

On October 22, MB recanted her statement to the police. She said she did so hoping that this action would improve her relationship with Annicka. On January 10, 2008, MB returned to the police and retracted her October 22 recantation.

The State charged Bristol with one count of first degree incest, including a domestic violence enhancement. RCW 9A.64, 020; RCW 10.99.020. A jury heard the matter.

Bristol testified at trial. According to him, MB asked for a back rub when she got home from work. While massaging MB, he talked with her about spending less time with her boyfriend and improving her performance at school. After this suggestion, “tempers kind of started flaring a little bit.” II RP at 199. Bristol said that he and MB argued until he “had no choice” but to take her to Gibbs’ house. II RP at 201. Bristol did not speak to MB again after that night.

Outside the presence of the jury, defense counsel told the trial court that Bristol would testify that during their argument, MB told him, ““All I have to do is say you touched me and it will set this into effect.”” III RP at 209. The State argued that the testimony was inadmissible hearsay. In response, defense counsel countered that it was not and also explained why Bristol took MB to her boyfriend’s home that night.³

² At trial, no one identified the person who contacted the police.

³ Defense counsel denied intending to use the statement to impeach MB.

The trial court declined to allow Bristol to testify about MB's statement, noting that "I think it's rife with potential issues under 403 and also expanding beyond the scope. The hearsay in and of itself has its own problems. That's why we have hearsay. Although this is not being offered for the truth of the matter asserted, it's rife with potential problems that I see." III RP at 210.

During cross-examination, the State asked Bristol if he agreed with MB's "extreme request" that he take her to her boyfriend's house around 12:30 or 1:00 a.m. III RP 217. He answered that he did. The State then asked, "And you took her there because you knew she might tell people what had happened between you and her in the bedroom, right?" III RP at 217. Bristol answered in the negative.

Defense counsel again objected to the trial court's evidentiary ruling, arguing that the State used the ruling "as a sword as opposed to a shield" to garner misleading testimony from Bristol. III RP at 219. The trial court overruled the objection.

The State continued its cross-examination, during which it elicited testimony about Bristol and MB not talking for two months after "what [Bristol] described . . . as a normal teenager-parent discussion/fight" and how he "never asked [MB] why she made these [allegations] up about [him]." III RP at 229.

On re-direct examination, defense counsel asked Bristol, "Did you have reason to believe, because of your conversation with [MB], that she was going to make this allegation?" to which Bristol replied, "She said it, so yes." III RP at 233. When defense counsel asked Bristol why MB made these allegations, Bristol testified,

Because . . . I had basically told her that she was not going to be spending the

night at [Gibbs'] house anymore, that he was not going to be spending the night, that we were going to bring her curfew back in, because it was getting to be the beginning of the school year, it was late in August, school was getting ready to start. And my thought process was, we've got one more -- we've got one last year to help her get through this, you know, school year, graduate from high school, hopefully, and so, you know, I was going to -- I basically had planned on laying down the law of curfews and rules and what you can and can't do.

III RP at 234.

Bristol called MB's acquaintance, Bryce Girkin, and his mother as rebuttal witnesses.

Girkin testified that sometime in October, MB talked about the incident with Bristol and said, "I was just mad at my mom because she wouldn't let [Gibbs] stay there at the house." II RP at 162.

Girkin's mother testified that in March 2008, she heard MB tell Annicka that she retracted her recantation because Annicka and Bristol would not allow Gibbs stay at their house.

As noted, MB testified at trial. When she took the stand, the trial court, over defense counsel's objection, excluded Annicka from the courtroom. The trial court did so because of pending witness tampering charges her. Neither side intended to call Annicka as a witness.

The jury found Bristol guilty as charged. He appeals.

ANALYSIS

Exclusion of MB's Statement at Trial

Bristol contends that the trial court erred in not allowing him to testify that MB threatened him. He asserts that the trial court should not have excluded the testimony and doing so prejudiced him by affecting his credibility.

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A trial court abuses its discretion when it bases its decision

on unreasonable or untenable grounds. *State v. Fisher*, 165 Wn.2d 727, 759, 202 P.3d 937 (2009). Here, the trial court excluded Bristol's proposed testimony as hearsay and under ER 403.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible unless it qualifies under an exception. ER 802. Under the "state of mind" exception, a statement is not excluded as hearsay if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." ER 803(a)(3).

Here, Bristol sought to testify that MB said, "'All I have to do is say you touched me and it will set this into effect.'" III RP at 207. Bristol intended to use this testimony to explain MB's state of mind and emotion and to show what motivated him to take MB to her boyfriend's home so late at night. *State v. Spencer*, 111 Wn. App. 401, 406, 45 P.3d 209 (2002). The trial court could have admitted the testimony for these reasons under the state of mind exception to the hearsay rule. *State v. Crowder*, 103 Wn. App. 20, 26, 11 P.3d 828 (2000). Thus, the trial court based its decision on an untenable ground.

The trial court also excluded Bristol's testimony regarding MB's threat based on the testimony being "rife with potential issues under 403." III RP at 210. The trial court may exclude an otherwise admissible statement under ER 403 if its danger of unfair prejudice, confusion of the issues, or misleading the jury substantially outweighs its probative value. ER 403. Evidence presents a danger of unfair prejudice where it is more likely to arouse an emotional response than a rational decision from the jury. 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 403.3, at 441-42 (5th ed. 2007). Evidence presents a danger of

confusion where it deals with distracting side issues or where the jury will likely overvalue it. 5 Tegland, *supra*, § 403.4, at 451-52. Courts generally should not exclude evidence under ER 403 where the evidence is “crucial to the central contention of a valid defense.” 5 Tegland, *supra*, § 403.9, at 468.

Bristol’s testimony was relevant because it tended to increase the reasonableness of his knowing about MB’s allegations immediately after the fact, taking her to Gibbs’ house late at night, and not talking to MB between August and October despite his claim that he did not sexually assault her. *See State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d 892 (1996). In fact, considering the “he said/she said” nature of this case, Bristol’s recounting of MB’s threat was crucial to his valid defense that he did not sexually assault her and that she lied when she accused him. *See* 5 Tegland, *supra*, § 403.9, at 468.

Bristol’s proffered testimony also did not present a danger of unfair prejudice because it did not deal with an issue that could elicit an emotional rather than reasoned reaction from the jury. If the jury believed that MB threatened Bristol, then it would be rational, not emotional, for them to find him more credible and her less credible. *See* 5 Tegland, *supra*, § 403.3, at 441-42.

Bristol’s proposed testimony also did not present a danger of confusion because it dealt with an issue directly on point on the issue of his credibility and possible guilt. *See* 5 Tegland, *supra*, § 403.4, at 451-52. Instead, as defense counsel pointed out, not allowing Bristol to testify about the content of MB’s threat increased the likelihood of jury confusion because the State questioned his motives for various actions knowing that he could not testify about the reason behind those motives. Thus, the trial court also based its decision to exclude Bristol’s relevant

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testimony under ER 403 on an untenable ground.

Harmless Error

When the trial court commits an evidentiary error, such an error justifies reversal if it results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Prejudice from an evidentiary error occurs where, within reasonable probabilities, the error materially affects the outcome of the trial. *Bourgeois*, 133 Wn.2d at 403. Harmless error occurs if the evidence is of minor significance compared with the overwhelming evidence as a whole or where other evidence establishes the same facts. *State v. Yates*, 161 Wn.2d 714, 766, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008).

Here, the State introduced no physical evidence against Bristol. Although both sides produced multiple witnesses, only two individuals actually witnessed the events on the night in question: Bristol and MB. Thus, Bristol's and MB's credibility were both essential to the outcome of this case. Precluding Bristol from testifying to the content of MB's threat could have adversely affected his credibility, especially considering the State's attempts to impugn Bristol's motives for certain actions directly affected by MB's threat.

The State argues that despite the trial court's ruling, Bristol had an opportunity to tell his side of the story. We disagree.

Although Bristol testified that MB "said something" about allegations of sexual abuse on the night in question and speculated that she made the allegations because he "planned on laying down the law," he could not testify about the content of her statement. II RP at 202; III RP at 234. Bristol's having to talk around the threat without relating the content of the threat could have led the jury to interpret his testimony consistently with MB's testimony that she offered not

to tell anyone about his assault of her if he took her to Gibbs' house.

The State also argues that Girkin's and his mother's testimony had the same effect as Bristol's precluded testimony. Again, we disagree.

Girkin's and his mother's testimony related to events that occurred weeks or months after the night in question and as a result does not replace Bristol's full accounting of the events that occurred between him and MB. Also, Girkin's and his mother's testimony does not necessarily repair the damage done to Bristol's credibility through the State's zealous cross-examination. Thus, the evidentiary error here harmed Bristol, requiring reversal of his conviction.⁴

Reversed and remanded for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, J.

We concur:

Penoyar, A.C.J.

⁴ Bristol also assigns error to the trial court's decision to exclude Annicka from the courtroom, arguing that the trial court closed the courtroom without following the procedure set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Because we reverse and remand for a new trial, we do not address this issue other than to note our Supreme Court has held that the trial court has broad discretion to regulate a trial and generally does not abuse its discretion by excluding an individual from the courtroom. *State v. Gregory*, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006).

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Lau, J.